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February 1, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 8, 2005

Case Number: TSO-0193

This Decision concerns the eligibility of **XXXXXXXXXXXXXXX**("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the access authorization should not be restored.

## I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also "security clearance") are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id. See generally Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

In September, 2004, the DOE notified the Individual that it possessed derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8, paragraphs (f)[1] and (h)[2]. *Attachment, Notification Letter (Notification Letter Attachment) dated September 15, 2004*.[3] The letter advised the Individual of his right to request a hearing in the matter and he did so. The DOE forwarded the request for a hearing to the Office of Hearings and Appeals (OHA) and I was appointed to serve as Hearing Officer.

## II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position that requires him to have an access authorization. On November 11, 2003, the Individual was stopped and charged with Driving Under the Influence (DUI) of alcohol. The Individual reported the incident and, on February 23, 2004, a Personal Security Interview (PSI) was conducted in order to resolve any "questions as to (his) continued eligibility for a DOE access authorization or security clearance." *PSI at 2.* According to the Individual, he was charged with DUI, booked and released. *PSI at 7.* Subsequently he appeared in court on November 19, 2003:

> [T]he judge asked me what had happened and, of course, the (arresting) officer was there present. And I told . . . him exactly what I told you (the PSI interviewer about the incident). So the officer agreed and, and the judge didn't dismiss it (the DUI charge), but he brought it down to a Reckless from a DUI for the simple matter that it really wasn't my fault for swerving 'cause of that other individual that cut in front of me. So he agreed to drop the, the DUI and charge me with, uh, Reckless (driving).

*PSI at 11-12.*

Thus the Individual stated that the charge was reduced from DUI to reckless driving, he was fined and required to perform 24 hours of community service, to undertake a drug and alcohol screening assessment and to attend a substance abuse victim impact panel. *PSI at 10-12.* It appears from the PSI Transcript that the drug and alcohol screening assessment may have produced a recommendation for substance abuse treatment. *PSI at 11.*

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[1] (f) Deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31.

[2] (h) An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.

[3] There is no charge under 10 C.F.R. § 710.8(j).

During the course of the PSI, it developed that in his letter reporting the November 11, 2003, incident, the Individual had stated that the DUI offense was his first. *PSI at 15.* However, the interviewer pointed out that the Individual also reported a Driving While Intoxicated (DWI) charge in 1992. *PSI at 16.* The Individual responded that the statement in the November 11 report was an error. *PSI at 15.* There is also some discussion of a 1968 event involving the Individual, reckless driving and an accident. *PSI at 25.* The Individual denied alcohol was involved in the 1968 event.

The PSI was apparently not dispositive of the security concerns. As a result, the Individual underwent a psychiatric interview and evaluation on April 27, 2004.

For the interview, the psychiatrist was asked by DOE to consider four questions:

a. Has the subject been or is the subject a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?
b. If so, is there adequate evidence of rehabilitation or reformation?
c. If not rehabilitated or reformed, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation?
d. Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?

Report of April 27, 2004, psychiatric interview at 2 (the "PSY Interview").

The psychiatrist responded "yes" to question a. – that the Individual is a user of alcohol habitually to excess – but that the Individual is <u>not</u> alcohol dependent. *PSY Interview at 24-5.* As to question b., the psychiatrist answered "no." *PSY Interview at 26.* The doctor observed that the Individual was showing some evidence of rehabilitation but, because he was still drinking, the evidence of rehabilitation or reformation was not "adequate." *PSY Interview at 26.*

To question c. – what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation? – the psychiatrist responded at length:

> <u>As adequate evidence of rehabilitation</u> the (Individual) can do one of the following:
>
> > (1) Produce documented evidence of attendance at Alcoholics Anonymous for a minimum of 100 hours <u>with a sponsor,</u> at least once a week, for a minimum of one year and be completely

abstinent from alcohol and all non-prescribed controlled substances for a minimum of 1 year following the completion of (the AA) program = 2 years of sobriety.

(2) Satisfactorily complete a minimum of 50 hours of a professionally led, substance abuse treatment program, for a minimum of 6 months, including what is called "aftercare" and be completely abstinent from alcohol and all non-prescribed controlled substances for a minimum of 1 ½ years following the completion of this program = 2 years of sobriety.

Given that the subject has had two DUI arrests while holding a NNSA "Q" access authorization and given that the last DUI (November, 2003) occurred while he was in PSAP as a Security Police Officer, any future resumption of drinking alcohol or using non-prescribed controlled substances will be evidence that the subject is not showing adequate evidence of rehabilitation.

As adequate evidence of reformation there are two alternatives:

(1) If the subject goes through one of the two rehabilitation programs listed above, then **2 years of absolute sobriety** would be necessary to show adequate evidence of reformation.
(2) If the subject does not go through one of the two rehabilitation programs listed above, then **3 years of absolute sobriety** would be necessary to show adequate evidence of reformation.

For the reasons given above any future resumption of drinking alcohol or using non-prescribed controlled substances will be evidence that the subject is not showing adequate evidence of reformation.

*PSY Interview at 26-7.*

Due to the diagnosis of alcohol abuse, in response to question d. – "Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?" – the psychiatrist responded "yes." PSY Interview at 28.

Based on the foregoing, the September 13, 2004, Notification Letter was issued to the Individual.

## III. NOTIFICATION LETTER AND RESPONSE

The bases for the Notification Letter are:

> During a PSI . . . (the Individual) denied that his arrest in 1968 for Reckless Driving, and which resulted in an accident, was the result of alcohol. However, approximately two months later during a DOE-consultant psychiatric evaluation (the Individual) told (the psychiatrist) that he had consumed 7 or 8 beer(s) prior to the arrest in 1968 and he was not charged with DUI because he was under 18 years old.
>
> . . . .
>
> In his report dated April 27, 2004 . . . (the DOE-consultant psychiatrist) indicated that (the Individual) was a user of alcohol habitually to access at least in 1967, the mid 1970's to 1990, and in 2003 and he is currently suffering from Substance Abuse, Alcohol. (The Individual) does have a mental condition (Substance Abuse, Alcohol) that causes or may cause a significant defect in judgment or reliability.

*Notification Letter Attachment.*

The Notification Letter goes on to enumerate the 1968, 1992 and 2003 arrests and associated alcohol involvement.

In response, the Individual points out that the formal documents relating to the 1968 and 1992 incidents do not include alcohol and, therefore, his responses to questions in the PSI and security questionnaires are correct.[4] He makes the same point concerning the 2003 arrest, *i.e.* that the final determination reads Reckless Driving, not DWI. Concerning judgment and reliability, the Individual states that he has made decisive and important decisions without supervision for his 13 years of employment, and therefore has no defect in judgment or personal reliability. *Individual's Exhibit 2.*

## IV. THE HEARING

Attending the Hearing were the Individual and his attorney, DOE Counsel and the DOE-sponsored psychiatrist. One witness testified on behalf of the

[4] However, in the past the Individual has handled this question differently: "**QNSP, 09/12/96, PART II FOR PSAP**: 23 YOUR POLICE RECORD D. Have you ever been charged with or convicted of any offenses related to alcohol or drugs? YES, 03/92, DWI, Charges Dropped."

Individual. The DOE psychiatrist remained present during the entire Hearing in order to receive any information that might affect his opinion and diagnosis.

DOE Counsel outlined the matters that had led to the Notification Letter, i.e., the November 11, 2003, DUI arrest leading to the PSI and the psychiatrist interview. *Transcript of the November 16, 2005, Hearing (hereinafter "Tr.") at 7-8.* DOE counsel noted that during the PSI the Individual "denied that his arrest in 1968 for reckless driving . . . was the result of alcohol." *Tr. at 9*. "However, approximately two months later, during a DOE consultant psychiatrist evaluation, (the Individual told the psychiatrist) that he had consumed seven or eight beers prior to the arrest in 1968 and that he was not charged with DUI because he was under 18 years old at the time." *Tr*. at 9. This relates to his alcohol consumptions and the 10 C.F.R. § 710.8(h) concern cited in the Notification Letter.

DOE counsel also pointed out the psychiatrist's diagnosis of alcohol abuse and the attendant possibility of a defect in judgment or reliability, and added that – contrary to the Individual's statements -- there is evidence of alcohol involvement in the 1992 and 1968 driving-related arrests. *Tr. at 9.* This is the heart of the paragraph (f) concern.

The Individual's attorney provided material from an outpatient recovery program showing the Individual's regular attendance for a total of 56 hours during the period May 25, 2005 through November 11, 2005. According to the Individual, all participants in the program are tested for the presence of alcohol before each session and he had never tested positive. *Tr. at 46*. The Individual claims abstinence from alcohol for approximately 17 months as of the date of the hearing. *Tr. at 73*.

The witness for the Individual is a manager for his employer. He testified to knowing the Individual for approximately 13 years on the job and that he was a good employee who was required to -- and did -- exercise good judgment in his work. The witness also testified that he had seen the Individual's work record and it did not reflect any disciplinary actions or any other derogatory information.[5] He stated he had never seen nor known the Individual impaired on or off the job.

The DOE-sponsored psychiatrist outlined the bases for his diagnosis of the individual and the findings in the PSY Interview, namely, that the Individual was abusing alcohol and uses alcohol habitually to excess. *Tr. at 67*. As to whether the Individual had satisfied the doctor's recommendations for rehabilitation and reformation, the psychiatrist testified "no, he has not." *Tr. At 69*. The doctor

[5] Quoting employer's personnel records: "On 12/11/97, [the Individual] was given 30 day disciplinary suspension. He was on leave without pay from 12.11.97 to 01/10/98. *PSY Interview at 13.*

also testified that the Individual "needs to be abstinent for another . . . year-and-a-half." *Tr. at 70*.

At this point the Individual's attorney pointed out that the Individual had been "abstinent first (for about) 12 months . . . and then the counseling program." *Tr. at 73*. That makes about 17 months, according to the Individual's attorney. The DOE-sponsored psychiatrist responded "(t)hat's not what I wanted for him . . . I wanted him to go through the program and then to have a year-and-a-half after the program, to make sure that what he learned in the program was being implemented or effective . . . I wanted a total of two years of sobriety." *Tr. at 73*.

In sum, the psychiatrist testified that: "My opinion is that his risk of relapse in the next five years is easily 25 percent. So it's not where I want it to be." *Tr. at 77*. I understand this to mean that the risk of relapse is unacceptably high, precluding a finding that the Individual is rehabilitated or reformed. There followed an extended colloquy between the Individual's attorney and the DOE-sponsored psychiatrist which, concerning relapse, included the following testimony of the doctor:

> a [judge's] release order (for the Individual) signed 11/11/03 . . . says not to possess or consume alcohol. (That's) significant . . . because here, you know, the court is telling him not to drink, and he drank; he has an interview with the personnel security specialist, he says he's not going to drink, and he drank; I interview him a couple months later, and he tells me he's not going to drink again, and he drank.
>
> * * *
>
> So, to me, that was significant that you (the Individual) were under court order not to drink and you drank

*Tr. at 96*.

Finally, sua sponte, the psychiatrist stated:

> One of the other things I would have found very useful is if you (the Individual) had anybody that . . . could corroborate that you haven't been drinking, because that's one of the thing I didn't hear.
>
> So, I'm just saying, in terms of all the things that I took into consideration in making my opinion, anybody – I mean, your family members, people that are your friends, anybody that you could have presented that could

have corroborated that you haven't been drinking could have – it could have been favorable for me to hear that, because everything I'm basing my opinion on is just basically what you're saying.

*Tr. at 107*.

## IV. STANDARD OF REVIEW

Applicable DOE regulations state: "The decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b) (6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. Any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a). For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and should not be granted access authorization at this time.

## V. OPINION

I find the psychiatrist's opinion and strong testimony to be dispositive. The Individual has taken some steps towards rehabilitation but they are well short of

what was recommended.[6] And there are no countervailing considerations. Furthermore, misstatements, contradictions and testimony in the record suggest that the Individual's claims of abstinence should not be accepted without independent support. Therefore, I conclude that the concerns in the Notification Letter that involve 10 C.F.R. § 710.8(h) are unresolved and the request for reinstatement of the personnel security clearance should be denied.

There was no direct testimony about the 10 C.F.R. § 710.8(f) concerns of the Notification Letter. These are that the Individual:

> Deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility.

*Notification Letter Attachment*.

Misstatements by the Individual, such as whether alcohol was involved in the 1968 accident, and the misreporting of the 2003 DUI arrest as unique, are troubling. However, the first was approximately 37 years ago and the second related to an event in 1992.[7] Taken alone, each might be minimized as memory lapses or confusion as to what was to be reported. On the other hand, the record, the PSI transcript and the PSY Interview report include quite a few other lapses as well as contradictions.

The drinking that the Individual recounted in the psychiatric interview is quite different in volume and frequency than what emerged in the Personnel Security Interview. For example, in response to questions from the DOE personnel security specialist about his alcohol consumption before the November 2003 traffic incident, the Individual answered "two beers" and "four glasses" of wine. *PSI at 7-8*. In response to the Psychiatrist, he answered "four to five beers . . . and then half a bottle of wine." *PSY Interview at 18*.

The PSY Interview also recounts the basis for a disciplinary action (FN 3) noted in the Individual's personnel records:

[6] See, e.g., Case No. VSO-0015, affirmed by OSA, 1995, rehabilitation insignificant.
[7] Under other circumstances the Individual has recounted the 1992 event differently. See note 4, *supra*.

> **New Information:** Incident report was received on 12/1997, stating the following: Subject [the Individual] approached his employer through a union steward and revealed that he had divorced his spouse in January 1996 and had never taken her off of his insurance. Subject's employer continued to pay the premiums for her . . . subject indicated that he didn't realize that this information had to be reported to his company. However, in August 1997, the subject had to complete a new form for the company's changeover to [a different] insurance on which he continued to list his ex-spouse, therefore continuing to make her eligible for medical and dental coverage. This improper completion of the form continued to cost the company money.

*PSY Interview at 15*.

In sum, the record contains many inconsistent or at least artful answers, different versions of events, and other contradictions -- too many to be dismissed as carelessness or faulty recollection. Therefore, aside from the alcohol problems, I do not believe I could conclude that the 10 C.F.R. § 710.8(f) security concerns have been alleviated.

## VI. CONCLUSION

The Individual has not resolved the Criteria F and H concerns set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, the Individual's access authorization should not be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: February 1, 2006